

## The Politics of Human Shielding - Session 4: Human Shields, Human Rights & Military Necessity

Let's start our

[INAUDIBLE] session with Charles Dunlap from the university, and Avner Gidron from

Amnesty International. The session is entitled

Human Shields, Human Rights, and Military Necessity. Neve and I prepared

five questions for Avner and Charlie. I'll be right back. So I'm going to

ask the questions, and then for every

question, we're going to have five

minutes each for a reply, and then we're going to

open after each question another five minutes debate. So let's start

with the first one. From Mosul in Iraq

through [INAUDIBLE] City to Luhansk in Ukraine back

to the East Syrian front, accusations of

using human shields as an instrument of protection,

coercion, or deterrence have multiplied. Why, in your view, is

human shielding becoming an increasingly debated topic? And taking into account that

human shielding is actually not a new phenomenon, why was

the phrase hardly evoked in the past? And what are the military

[INAUDIBLE] reasons triggering the widespread

records to this phrase within this contemporary moment? Avner. Sure, I'll start. I think I'll talk briefly

about developments in the law, a little bit about

technology, and then the nature of or warfare

in terms of protection. Thank you, Brown University,

for inviting me to participate. Speak louder. I've really enjoyed

the seminar so far. I think we should bear in

mind that detailed treaty rules on the conduct

of hostilities are less than 40 years old. It really only was the

1977 additional protocol, one that these rules have

been elaborated and codified. That's not to say that the

concept of human shields and the prohibition

of human shields in international human

law, humanitarian law, did not exist. But it was conceptualized,

I would argue, differently in the 1949

Geneva Conventions. There, it's really--

and to a certain extent, remains-- in the realm of

fundamental guarantees of IHL, as with the prohibition of

torture, inhumane treatment, and medical scientific

experimentation. It was conceptualized

as a way of protecting certain categories of people--

principally prisoners of war and certain sub-categories

of civilians who are protected persons under the Fourth Geneva Convention. Now, the frame changes somewhat with additional protocol-- one, when you put this within the context of rules of conduct of hostilities, it's about regulating the means and methods of warfare, of the parties in war, to protect or minimize harm to civilians and uphold the principle of distinction. Other legal developments, of course, which we've referenced before, is the development of international criminal law, beginning with the Ad-Hoc tribunals for Yugoslavia, especially, but also for Rwanda, and then the Rome Statute, then the international criminal courts giving the criminalization of war crimes some teeth beyond the national jurisdiction. And that's also been complemented by universal jurisdiction and similar forms of jurisdiction of being used, including against militaries with advanced technology. And in fact-- I don't know if you've heard this-- yesterday, a court in South Africa has issued an arrestable warrant for Israeli commanders who were involved in the Gaza flotilla incident. And if I'm not mistaken-- I only read it very quickly-- one of them was [INAUDIBLE], actually. So this is-- all of this means that IHL in general-- the protection of civilians, issues of civilian casualties-- has become much more of a publicly-debated issue. And terms that used to be terms of honor, including human shields, become part of a public debate. But I would argue you also get either watered down or completely distorted in their meaning by the way they're often used in the media. Very briefly, developments in technology-- as we know, vast militaries are theoretically capable of much greater precision than ever before. Warfare becomes more remote controlled. On the other side, you've had developments in mass media, but perhaps more importantly, social media and citizen journalism covering attacks and their aftermath. This means anyone with a phone can broadcast and receive images of the gruesome results of strikes that kill and maim civilians. And in terms of the nature of warfare and of the battle space, there's no doubt that there's been a

shift in the balance of the burden of warfare being borne by civilians. Of course, it's true, as Chase and others have talked-- even in the heyday of battlefield warfare between the European great powers, you had at the same time these forces of imperial conquest and Colonial wars in which it was a very different scenario, and you had huge numbers of civilians killed with impunity. Arguably, World War II brought back rule of warfare to Europe with a vengeance. And the regulation that you've seen has been a reaction of that. And you saw the vestiges of these types of warfare from the Colonial days, in the dying days of Colonialism in Algeria, Vietnam, Malaysia, [INAUDIBLE], Kenya, et cetera. I think someone has already mentioned-- Protocol 1 is a recognition of as international armed conflicts, wars in which people are fighting against colonial domination and against regimes and exercise of the right to self-determination was an attempt formerly to bring the detailed rules on the conduct of hostilities into these arenas of conflict as well. I would say that another contemporary phenomenon related to the rhetoric of shielding, at least, is the tendency to import international humanitarian law into areas where it doesn't belong by declaring wars on concepts, such as wars on terrorism, and then trying to apply IHL and IHL concepts, including shielding, into areas that aren't actual armed conflicts under the definition of international humanitarian law. Most obviously, there's a ongoing, as far as the US is concerned, global non-international armed conflict against Al Qaeda, the Taliban, and associated forces. I'm not saying that none of that is armed conflict, but it's not an armed conflict because they're fighting against somebody who they say is an Al Qaeda member or Taliban militant. In order for it to be an armed conflict under the law, there needs to be a nexus to an actual armed conflict. As these are non-state actors, we're talking about a non-international armed conflict. That means you need a requisite threshold of actual violence as well as the organizational criteria. That means that the non-state actor against which you're fighting has to have certain features. The Taliban would

clearly meet this. Al Qaeda, not that clear. It depends when and where. So I would say all these developments together mean that governments and militaries in the West feel on the defensive about civilian casualties, in part because of domestic reception. I think that is more the case in Europe than it is in the United States. But importantly, international perception and legitimacy, they feel all the greater pressure and deflect the blame for harms of civilians and civilian objects, where once they mostly just had to worry about justifying their own losses to their own populations. So what this means is that accusing the other party of wrongdoing-- including saying that these casualties happened because of shielding-- becomes almost a reflex. Israel, perhaps, is leading the way in that. But you see that, as we've already discussed, with the US and the Kunduz MSF hospitals. It can't be the fact that we did something wrong, because we're a nation that follows the law, et cetera, so it must be that the other party coaxed us, forced us to kill civilians and attack a hostile. Thank you very much. And the first thing I'd like to say is-- well, I agree with a lot of what you had to say, but I want to say thank you to Brown University and all the organizers. My wife always said, you go to these places, and you never say thank you. And it's on the tape, and it's like you're ungrateful, blah, blah. So dear, I said thank you. And also, quite honestly, I go to quite a few conferences, and oftentimes, I try to find a place for my mind-- some happy place for my mind to go by [INAUDIBLE]. That wasn't today. This was really, really interesting. I didn't agree with him-- surprise, surprise. I didn't agree with everything. But it's really interesting. I think it shows the genius of what Nicole and Eve have done by emphasizing the interdisciplinary nature of these issues. Because they aren't just legal issues. They aren't just political issues. It brings everything together. And I think that's the only way we're going to get anywhere. So why do we hear more about human shields today? Because it works. It actually changes the behavior of militaries. But why is that? Well, I think it has a lot to do with globalization, believe it or not, because globalization operates to raise the visibility of international law generally. Because years ago, places like China did not have law like

we would understand it. But now, if you want to have international commerce, you better have forms, you better have contracts. So it raises the whole idea of international law, which is why in law schools, about eight or nine, 10 years ago, international law became really popular. Because honestly, when I went to law school, there was an international law course. I'm not 100% sure I didn't take it. But I don't think that there was. And what you see happen in the commercial realm often bleeds over into the military realm. So we're talking about this rise of law. The other thing-- and Avner mentioned this-- you can't underestimate the impact of technology, meaning reporting technology, visual technology, social media. And what it's done-- it's allowed citizen journalists, adversaries, whoever, to get inside what we call the decision cycle. In other words, they can tweet out pictures faster than government can figure out, A, what the facts are, or B, what do about them. And we saw-- I don't know how much we want to talk about the Kunduz thing, but we saw that. Even before any facts were known, Doctors Without Borders was calling it a war crime. And the military is trained-- hey, let's get the facts. Let's do an investigation. But that may not work in the 21st century. But the idea of human shields-- it does work. And just three days ago in the New York Times, there was an interesting article about the US is now attacking the fuel trucks that ISIS is using to transport fuel. As you probably know, the sale of fuel is the number one source of income for ISIS. And from a military perspective, I can tell you a lot of people are thinking, it took you 14 months to figure out that maybe you ought to go after the fuel trucks? And if you read the article, it says, well, they hadn't done it because they were concerned about civilian casualties. What civilian casualties are they talking about? The drivers. And so before this strike, what they did is they went and they dropped leaflets, and then they did a-- it's called a gun run, but they didn't actually shoot anything. Have you ever been about when

a high performance airplane flies over you at 50 feet? It causes changing of clothing. It is so terrifying. So then they came back an hour later, and then they destroyed the trucks. And then they say, well, we saw the drivers running into a tent, as we had been attacked. Whether all that was really required by the law of war, I would suggest not. And this is where I do disagree with you a little bit, Chase. I think that the problem with restrictive rules of engagement-- when people of good intentions try to improve upon what the law of war requires, it ends up-- and I'm just experimenting with this idea of a moral hazard. Because then the military can say, we didn't attack that. We didn't cause any civilian casualties. I'm not going to be on the front page of the Washington Post. But what it doesn't say is each time you forgo a strike, that means for 14 months, people were selling oil, which financed ISIS, which caused untold misery to how many millions of people in the Middle East and Syria, because people are trying to improve on what international law provides? I think that we need to think. A lot of this stuff in IHL doesn't make sense to us when we first see it. But most of it was developed not by lawyers, actually, but out of the actual combat experience of nation states. And so there are things that don't always seem to fit to us, and surprise us, that do have a lot of sense. And the fact of the matter is, inside the militaries-- and certainly the US military, but I would suggest at least NATO militaries, and especially when you start getting to Asian militaries, like Japan, for example, who are hyper-- don't want to be involved with anything that might be resulting in casualties, it has a huge impact. Anybody that says that IHL doesn't matter, they aren't speaking from military experience. I can tell you that. Because it does really change behavior. It changes targeting aspects. Alice raised an interesting thing about the role of lawyers. And I think you were being complimentary. I'm going to go out on a limb there on that. But here's what I found in actual experience. It is much more common to be telling a commander, no, international law doesn't prohibit that. Are you sure, Judge? Because, see, they do want to do something, but they don't want

to make the decision. They'd almost want the lawyers to say this or that. There have been instances like that. And I think the role of law within the military-- especially with respect to something like human shields and civilian casualties writ large-- honestly, inside the military, you don't hear so much discussion about human shields, because it's so ingrained that the adversary is embedding himself into the civilian population for the purpose of complicating their targeting solution that you don't actually use the term human shields. It's always about avoiding civilian casualties, or "civ cas." Civ cas is the inside phrase. And we're seeing it more now. The hot terminology in the military these days is hybrid war. And there's a good [essay on human rights](#) on it on the lawfare blog by some guy from the UK. Is there a University of Exeter, or something like that? Yeah. A young guy, really interesting, where it's a blend-- as Bruce pointed out, asymmetric warfare is-- that's been since the beginning of warfare. It has to do with using your capabilities against the adversary's weakness. In the context of human shields, what the adversary is trying to do-- the center of gravity that they perceive in Western countries is adherence to the rule of law. So they might attack and gain an advantage that way, by making it appear that this thing that we treasure is being violated by military forces. Very Clausewitzian. Clausewitz talks about his remarkable trinity, and it's the people, the military, and the government. Most Western militaries try to destroy the capability of the military. It's called strategy of denial, the guy that Cornell wrote the book on. But adversaries don't try to do that that. They're not trying to destroy the military capability. They're trying to separate-- they want to deconstruct Clausewitz's, quote, "remarkable trinity" by separating the people from the government and military. And so that's why-- and it's been effective. It's been effective. It's been more effective-- I hate to say this, but human shields are more effective than antiaircraft guns, than jet fighters. And adversaries have gone to school with that. Who put up the [INAUDIBLE]? Somebody had that on

one of their slides. [INAUDIBLE] bunker from the First Gulf War-- I don't know if you remember what that was, but the US bombed with a precision weapon. If you looked at the photos, there are smart guys that will tell you, hey, if that has that kind of antenna, that means there's this kind of radio in there, and that's what was bombed. What we didn't know at that time was it was being used as a bomb shelter for the families of high Iraqi officials. So when CNN filmed that, there weren't a lot of bombs in downtown Baghdad anymore. And Gordon and Trainor, in their book on the Gulf War, it says, it accomplished what Iraqi air defenses weren't able to accomplish-- it stopped attacks in downtown Baghdad. Adversaries have gone to school with that. And they think, we don't have to get an F22. We don't have to build-- we don't have to buy these C100 anti-aircraft guns. We can use this technique. So it does work. And a lot of time and energy is being spent by militaries trying to figure out how to counteract it. That's why-- you ever hear this system, the sound system, where they figured out this high-pitched sound to use to disperse crowds? Because during Somalia, they used to bring crowds of people down, and the fighters would be behind them. And so they wanted to use this high-pitched sound. But one of the inhibitors of the development of nonlethal and low lethal is international law. Because is that a biological weapon if-- for example, just on the Red Cross's blog last week, they had this long defense of tear gas, why tear gas should be prohibited under international law-- it is prohibited, and why that's a good thing. I've got a little rebuttal coming out about it. But if you talk to military people, you can't rationalize that to them. What do you mean? It's OK to shoot people, but we can't tear gas them? And the answer is, that's the way it is. And we talked over lunch a couple of reasons why that is, and if we want to get into that, we can talk about that later. Yeah. Maybe we can open the floor. Questions on this first question, the emergence. Please. Can I go back the lawfare issue? So I see here two positions in the lawfare warfare. So why is the ICRC-- or in this case, the Amnesty International--

and the other one is the military of-- not military in general, but military that has capabilities of using the laws of war in way that introduces technology. So what I'm missing in this first round is human shields is a very contested concept in lawfare, becomes when you're saying-- when you were invoking human shield, you had in mind a war crime, and you were explicit about it. When you are using a human shield, you are using it for-- and correct me if I'm wrong-- for trying to increase the calculation of proportionality in order to include more collateral damage within a target that has human shield. Are you talking about the piece I wrote for this thing? No, this justice exchange. So what I want to highlight is the contest over the term. So when you are using it, you are using it for the purpose of pointing at a war crime. And behind it is the laws of war as it stands today, it's fine. No one should tinker with it. When I hear you using the term, it's well, the laws of war are not fine, because actually, the other side, the adversary, is using it in ways that I don't like, because they're invoking the civilian privilege in order to decrease the number of legal targets. Well, if that's what you heard, that's not what I meant. Because I'm a strict believer in strict adherence to the core principles of the law of war. What I'm not-- You just said that if the tanker would have been-- if the civilian who's not directly participating in hostilities who's driving-- Well, number one, we don't know that that's what the driver is. But what I'm talking about is attacking the tankers. We should have attacked the tankers 14 months ago. That doesn't go with what you're saying. Because if the tanker is a legitimate target, and the drivers unfortunately get killed, but it's not illegal to attack a legitimate target to-- Correct. That's like the munitions workers. You are correct. What I'm saying is that we ought to adhere to what the law of war is. We ought not to, as a matter of policy, try to improve upon the law of war. And I'll give you another example where we've been talking about-- Maybe I was totally not successful in trying to point out that there are two concepts of what the law of war is in this warfare [INAUDIBLE]. There's the ICRC notion, and

there's the military notion. And either you believe that law has one, single answer or there's an inconsistency here. And I wanted to explore-- Well, I don't know that anybody was saying there are two different laws. I think that with all law-- with lawyers, you can get two lawyers to agree on something, you're excellent. So there are different interpretations of what the law is. And people come from a different perspective. The ICRC is a wonderful organization. In fact, I kind of wish that the Kunduz hospital-- that Doctors Without Borders had put a red cross on their building as Protocol 3 to the Geneva Conventions calls for, but they didn't. They put a French flag-- to many people, an inscrutable symbol-- and French language, and they put it right in the middle of Afghanistan and think everybody is going to know what it means. But be that as it may-- You're saying that the US didn't know that this was a hostile? After 30 minutes of communication with them? OK. Let me give you this example. If somebody called up Brown University and said, where's Charlie Dunlap-- you know where he is, because someone at Brown University knows where he is. The chaos of the battlefield-- and especially if you also look in the New York Times, they brought in Afghan troops and US troops from outside the area, which is not a surprise, since the troops that were there were forced out. And in the chaos-- when people are under extreme stress, and things are happening, and it's dark-- oh, where's my GPS, where-- half the Afghans hardly have rifles and uniforms. So the chaos of combat can create mistakes. That's why the Geneva Convention Protocol 3 is so important. You ever see the US hospital ship? The whole damn thing is painted white, and there's a three-story high red cross on it so there can be no confusion. If you've ever been to any of these cities in Afghanistan, every building looks the same. It's kind of like in the Middle East-- you ever go jogging, you better drop corn, because you'll never find the way back. Because there's no road signs. There's no anything. And if you don't speak the local language, it can be very confusing. But be that as it may, the problem when you-- President Obama, you've got to love him for this reason. He wanted to project concern for civilian casualty, so he announces to the world that we are not going to conduct a drone strike unless there's a near certainty of no

civilian casualties. What do you think the enemy does with that? Do you think that they're indifferent to that? That's why they always have civilians around-- because the President has told them that they are protected from a drone strike unless there's a near certainty of no-- and that's not what international law requires. International law permits you to know, absolutely 100% certain, that you are going to kill civilians so long as the military advantage is such that that civilian loss is not excessive. Not if there is no target, as in a drone. Well, the military advantage, that is what the target-- No, but a drone doesn't have a lawful target. There's no calculation if there's no lawful target. Well, obviously, you have to have a lawful target. But most drones don't have-- Well, OK. If you believe what The Intercept says-- I can't argue with that. A SIM card is not a lawful target, is it? What? A SIM card. If you believe that that's the way the targeting works-- as I mentioned before, I was sitting there thinking, does anybody really think that a SIM card is-- that if you make a phone call, that makes you a target? And I'm thinking, you know, evidently, because these aren't very erudite gentlemen. We can agree on that-- the number of civilian deaths? Or no? Yeah. Take a look at the Bureau of Investigative Journalism, and you will see that there aren't. Even now, the guy from Amnesty who wrote the op ed in the New York Times a couple weeks ago, even he said, well, 22% of the casualties were civilian casualties. Number one, that isn't necessarily illegal. But the way they get to that number, they go back to 2010, 2009, and so forth. But if you look at the recent years, the numbers are very small. But then we have to think, who is responsible for the deaths? If we let that person live-- look at the UN report. The UN report for Afghanistan, for example, has consistently for the last several years, 70% to 75% of the civilian casualties were the result of anti-government elements, which means Al Qaeda and the Taliban. So each person you let live, then you are taking on that moral hazard. Because then you're

responsible for what casualties they incur, at least from a moral sense. Thanks. Maybe, Avner, if you want to respond? I think we should move to-- OK. The question is related. The second question is related to this last discussion, and it's what does human shielding mean to military legal experts, and what does it mean to human rights practitioners? This is just exactly-- I know. Do we not uphold human rights, and military professionals differ in their conceptions of the practice and normative significance of human shielding. Maybe Avner, you're going to respond. Can I rephrase that question? Sure. After this, I won't say anything. I promise. Don't promise. I won't. OK. The thing is that every person who operates the discourse of IHL operates under the assumption that it should not interfere with the legality or the morality of warmaking. And when you're doing is exactly that. And that is not different from what the shielders are doing. In your presentation, what they are doing is they're invoking the morality or amorality or the injustice of the force, and you are doing the reverse. So I'm not an ICRC person. But what someone would say is, no, this is neutral. The laws should be neutral. They should treat everyone as an individual combat. Whereas the shielders are saying, no, they aren't lawful, and we're going to take advantage of these rules. And you are seeing the inverse, exactly the inverse. So the problem is where to go after. One is, well, you will just win because you have more power today. Maybe not tomorrow, but today, you will win-- you meaning those powers with technology. But as we learned with you, well, I'm not sure that will be the case. And this goes back to the very old-fashioned idea of the ICRC that I used to mock, but I think it is true-- we don't know what the morality of war is. And under that assumption, we can agree on certain rules. But that requires that all players do fair play. And as some who are doing human shielding are not playing fair, I think what the use of human shields discourse from the point of view of the powerful forces with technology are using is also not fair play. So you would believe that we need to even up the technological capability? So we need to give ISIS more capability so it's more of an even fight so that they can enslave more-- --civilian unless

they're directly participating in hostilities. That's it. You have to decide. They're civilians, they're terrorists, criminally responsible for what they do, or they are civilians unless they directly participate in hostilities. That's it. Yeah. But the question is, do you basically agree on the same idea of human shielding? Do you feel that human rights practitioners and legal military experts conceive human shielding in the same way? And if yes, how, and if not, how? OK. As a human rights practitioner, I think there will be things in common. I think Charles and I both showed up in ties today. Neither of us is likely to reference critical theory or Foucault in our answers to these questions. [INAUDIBLE] Critique of Pure Reason for the fallacy of the undistributed middle, which is actually what I thought about. Amnesty is a human rights organization. For the first 30 years of our existence, our mandate essentially precluded work on conduct of hostilities. I worked on one of our first reports that really looked only at IHL and conduct of hostilities, which was about the NATO bombing of Yugoslavia and what we considered to be violations of IHL in that context by NATO. At the time, a senior colleague in the legal department only half jokingly referred to IHL as football rules for murder. There is suspicion in human rights organizations that is very, very old about discomfort with IHL. That said, for 20 years, we've been working recently on situations of armed conflict, and more and more on IHL. And if you're talking about human shields, you have to look at IHL. I think we'd agree that the definition is IHL is what you need to look at. If you take policing human rights situations-- you could say hostage taking might be analogous, but it really isn't. The logic is completely different. Resort to lethal force in a hostage taking situation is governed by the protect life principle. And what you're trying to do is basically protect people in the threat of death or serious injury, and lethal force must be the least harmful means available, including in relation to the hostage taker. If you're talking about human shields, then the IHL is completely different. You're talking about-- well, essentially, precautions, yes, but proportionality,

ultimately, which is the direct and concrete military advantage anticipated from the attack against the likely incidental harm to civilians and damage to civilian objects. In a policing operation rescuing hostages, incidental harm to civilians and damage-- you're trying to avoid harm altogether if at all possible, whereas an attack on military objective shielded by civilians, really, it's this proportionality calculus. Where we might disagree is how you weigh that. And I think in another question, we'll get into that more. But I think human rights practitioners are more likely to interrogate whether a situation is, in fact, armed conflict. If there is no armed conflict, there is no human shield. And then even in an armed conflict, if the target isn't a military objective, there is no human shield. For example, I think in November, 2006, I remember working on a case in Gaza which was a commander of the popular resistance committee, the Israelis warned they were going to destroy his house from the air. Because this was after they redeployed, so to speak. And people rushed to the roof of the house in order to protect it from being destroyed. I think even Human Rights Watch expressed concern this was human shielding. From our perspective, it wasn't. Because this was-- the Israelis weren't even saying that this house was being used for military purposes. This was a continuation of a long tradition of punitive house demolition, basically, which was it's a family home of somebody they suspected of plotting attacks against Israelis, so they were going to destroy the house. And people came in solidarity to protect the house. That's not human shields. Another example where we might disagree is on the difference between colocation and shielding. I think this is clear in the classic shielding cases, the unwilling human shields. It may even be clear in the voluntary human shield scenario. But in what's been referred to today as proximity shielding, that distinction isn't entirely clear. The colocation is something that's to be avoided. It's part of the precautions against the effect of attacking defending party would have to take. But it's an obligation of means. It's not an absolute prohibition, unlike human shielding. When we look at Gaza and a lot

of the incidents that Israel has said are clear-cut human shields, it's much, much less clear cut to us. Especially in Gaza, it's often hard to tell the difference between colocation and shielding, especially proximity shielding is difficult to differentiate. Bear in mind, even with warnings, et cetera, Gazan civilians don't really have lots of options of where to go. They can't get out. You don't see refugees from Gaza

when there's a war with Israel, because they can't get out. The Egyptians won't let them out. The Israelis won't let them out. Just one more port. Colocation, that's a difficult issue. Bear in mind even

in Israel itself, where they have more options, one of the biggest bases, the most important military bases in Israel is in the center of Tel Aviv in a very densely populated area, very expensive piece of real estate. In fact, in our experience documenting violations in the Israeli-Palestinian context, the clear cut, classic cases of human shields have been Israel using Palestinian civilians as human shields without prior warning procedure, which led to a decision by the Supreme Court prohibiting it. But then, again,

in [INAUDIBLE], we had situations where you had Israeli soldiers going into Palestinian homes in Gaza and using them as firing positions, and holding Palestinian civilians in there, too. I think it's one thing that you can take over a place and say, this is now a military objective. But if you do that, and you're using it to fire at the enemy, and you're holding the civilians there, that's human shielding. Well, I think we're pretty close on the same sheet as to what the law is. And honestly, one of great benefits of this particular

conference to me personally is I learn that I don't know as much as I thought I knew about what Israel is doing in the whole Gaza war and some of the other things that have been brought to my attention. But getting back to the law-- as Avner said, the law of war is *lex specialis*, and it displaces human rights law in those areas that it applies. I believe you can have the application of international human rights law and the law of war in the same area. For example, if a soldier steals something from a local, international

human rights law applies. That's not a law of war issue. But in terms of human shields-- and I do think there's a danger of conflating the general issue of " casualties with with the specific issue of human shields. Because human shields implies that humans are being used as a means and method of warfare in some way. I do think that when we-- in terms of why is-- I think the ICRC is very right in that they do not take an ideological view. Because if they did, it would unravel the whole scheme of international-- the law of war. In other words, every country thinks that they have the moral high ground. You might remember-- we talked about this during lunch. German soldiers during World War II, their belt buckle-- [GERMAN], God is with us. That was their mindset. I'm not talking about the SS. I'm talking about the [GERMAN], the typical German soldier. And the ICRC-- the wisdom of the Geneva Conventions is that they are-- in some [INAUDIBLE], there is no principle under international law of fair fight in the sense of you have to have both sides have equal capability of winning. And that's why when-- part of problem when we start using words like proportionality with respect to Gaza, I invite people to read Laurie Blank's post on proportionality, because it can get very confused. And just because one side wins in a lopsided way, that doesn't mean that the law international law has been implicated in some way. Because you can win overwhelmingly. You can have 100 to nothing. In fact, most military organizations aim to have 100 to nothing. I can tell you, in the United States Air Force, we intended to destroy enemy aircraft with zero losses. And a lot of taxpayer money has gone towards that. And oh, by the way, it's been pretty successful. Because if you don't do that-- and this is one of the objections that the US had to Protocol 2 of the Geneva Conventions, which is supposed to be non-international armed conflicts. Because in there, they granted combatant status based on the ideology of the non-state actor. Remember, it's fighting against colonial oppression and all that sort of thing. Because people can say all sorts of different things about what they're fighting for, and everybody thinks that they're fighting for truth, justice, and-- not the American way, but a good way. And so I think it has to be ideologically neutral. Otherwise, states aren't--

it would unravel everything. So you can't set up a system where, we like this little group, and gee, they have to put human beings at risk, because otherwise, they're not going to win. You can't have that. The civilians-- it's an untenable position to say it's OK to use civilians as human shields if you're a little group of neo-Nazis who's trying to overthrow the German government, that somehow they need to have a shot at doing that. That's not going to fly, and shouldn't fly, with nations. And if nations don't believe-- So the neo-Nazis should be killed? I don't understand the example of the neo-Nazis. Because you seem-- maybe I'm wrong-- I thought you were saying that the inferior militarily capable ought to be able to use human shields to protect themselves because they don't have the technology that, say, the German government has that they could bring to bear. No. What I mean is that if the neo-Nazis are not directly participating in hostilities, they are civilians. That's the-- Well, what we're talking about is in the context of an armed conflict. Because otherwise, as Avner said, then we're in international human rights law if it's just a criminal activity. But if you're talking about a group that's trying to overthrow a government or something and we're into the realm of the law of war as opposed to international human rights law or law enforcement, then you can't have a scheme by which you justify human shields. You can't take people and use them that way. It's not going to be accepted by nations, no matter how worthy somebody might think that little particular group is. Because that's not going to be accepted by nations, nor it should be. So there are three questions-- Bruce, [INAUDIBLE]. I think, to your last point, I don't think there's really a disagreement that human shields are illegal and that they shouldn't be used. The question comes is if they're used, what are the responsibilities of the attackers. When you mentioned 100 to nothing, as long as it's combatants versus combatants-- like the Gulf War-- not over the cities, but the Gulf War in the desert, that's fair game. If you lose none and they lose 100, that's war. But there are two indicators

we call the civilian casualty ratio, which is looking at the percentage of casualties that are civilian. Then there's something called the risk transfer ratio, which is how many of your soldiers die versus how many civilians died. Then you're looking at something other than this game of combatants versus combatants-- just to give an example, if NATO lost zero troops in the war against Serbia, and there were between 500 and 1,500 Serbian civilians killed, depending on-- there's not a definitive-- it does give an indication that NATO was not at risk. And so the loss of 500 to 1,500 civilians seems high compared to the risk that they had. And then if you compare the number-- let's say 3,00 people were killed. If 1,000 of them are civilians-- OK, there is no exact number, but 33% when you're following the rules of war is pretty high. It's not high if you're dealing with countries that deliberately target civilians, but that's-- again, proportionality, I know it's-- Well, those ratios are irrelevant. They don't exist in the law of war. Because what the law of war is concerned about is what is the military advantage. And so for example, if you have a guy in an apartment house filled with, say, 1,000 people, and the only person you want to kill, could there be a justification for that? Yes, and I'll tell you why-- if he's sitting there with a button that's going to set off a nuclear weapon in the middle of New York City. So military commanders have to make those kinds of decisions all the time. OK, but that's an extreme example. What's more likely in practice-- you have an apartment building. There are five Taliban. They're in there, and there's 20 civilians in the building. The question is, do you have to hit it at that particular moment? And at what point do you say-- if you say military advantage, yes, you could leave it to what's called the reasonable military commander. But at a certain point, you could claim a military advantage to anything. So there's got to be some semblance of balance. That's the idea. You're right-- these ratios mean something from a political perspective, which is what I'm working with. But here's the thing-- you do have to take reasonable precaution, so if there is another way

of accomplishing that. But on the other hand, you know how many people five Taliban can kill? A lot more than 20, and they have. So military commanders have to make those determinations. You're talking about a group of people that's responsible for over 75% of the civilian casualties in Afghanistan. So each time a commander forgoes it-- and they forgo a lot of strikes-- then those guys live to go out and kill not other combatants, rarely-- they rarely take-- how often do you think they take-- No, they obviously can't deliberately [INAUDIBLE]. That's a bad question. That's a bad question. There just was a suggestion. The people that want to ask questions, including myself, will ask, or will intervene or comment, and then both of you will just write down what we're saying, OK? OK. But there's something connected to the last question. Can I repeat? Yeah, sure. So for what I take from this discussion-- I missed two sessions, so I might be [INAUDIBLE]-- the basic problem is that there is no definition of military advantage, no real definition. What is a military advantage? Do you compare it to a specific attack and a specific target you're engaging with, or do you see it in a broader operational spectrum? And that's the thing with IHL. IHL is a powerful tool, but at the same time, it leaves so much room for interpretation for states that it easily becomes an instrument of justification, not a neutral standard. And that is-- OK. I'm going to make a strong claim. That's my opinion why, as lawyers-- I join you as a lawyer-- we should also look at the political side of things. We can never understand conflicts and standards if we only look at IHL. It is subject to constant reinterpretation by states, by actors. And I lost my point. So actually, my question is a specific question that assumes what-- what's your name? Sanna. Sanna says. Avner, when you talk about collocation and distinguish it from human shielding, that's exactly when we talk about the practice of discrimination. It's clear to me that Amnesty can call it collocation, and Charlie can call it human shielding. And both of them are firm. Both of you guys are referring to the same law, which is exactly what you're saying. So how do you actually make this decision between collocation and human shielding? So I think this also follows on both of these. I think that one of the

important issues to think about is the context within which the concept of human shields gets invoked in terms of the interpretation so that the lawyerly desire to interpret IHL as though if you do it right, it gives a correct answer under certain circumstances. And I think that the questions of particularly-- at least what I was stressing is the way in which, for example, the Israelis have reinterpreted in two specific ways sequentially the concept of human shields to the extent that they actually deprive civilians-- in the situation that Bruce was describing as the proximate context-- of their civilian status. They essentially say, they are deliberately targetable as such on the grounds that-- and those within that same proximity who might not, on some abstracted notion, actually be civilians by the Israeli point of view, then they are collateral damage. But the fault lies with the targeting operations. And so the question-- or just to get a response is that we should be thinking about how contemporary debates about human shielding are lending themselves to different understandings of where civilian-ness ends. And I would say maybe analogously, one can find the same thing in the US military rhetoric of drone strikes. Everybody is a combatant unless they're posthumously proven to be civilians after the fact. It's a kind of similar erasure of civilian-ness because you want to bomb. Chase and Nina. Yeah. I'm curious if either of you find that questions of jus in bello-- including human shields, but other-- end up serving as proxies for questions and criticisms of strategy and jus ad bellum. What happens-- if you see this happening, as a result, do things get obscured? It's OK, Avner Gitron, if you give an answer-- just your personal point of view, not the point of view of Amnesty International, which confines itself generally to only jus in bello, along with other human rights NGOs. Can you give us a little more on that, Chase, exactly what you mean? Well, there was an interesting exchange between Samuel Moyn and David Cole and Just Security Blog before the Dissent Magazine where Moyn pointed out that many liberals and Democrats who were against the Iraq war, rather than attacking and criticizing it full on and presenting plans for how to withdraw, confined themselves to criticizing the way in which the

Bush-Cheney war in Iraq and War on Terror more generally was being conducted, civil libertarian criticisms of the how of the war-- the renditions, Guantanamo-- without looking so much at the bigger questions. And are there liabilities to that coy and clever use of-- usually known as a stand-in for the strategic question? Nina? Yeah. I just want to raise the issue of legality versus legitimacy. It seems to me that the issue of involuntary human shields-- that's clearly illegal. But the issue of voluntary human shields or people running [INAUDIBLE] building is much more problematic. We have to ask, how does the law change? And we have cases where the powerful-- in the Kosovo war, going to war against Kosovo, we argued, the West, that, well, it wasn't legal, but it was legitimate, because it was conducted without a security council authorization. The killing of Gaddafi, I think, is a similar kind of case where-- Without UN authorization. Yeah, without UN authorization. No, it hadn't had UN authorization. The killing of Gaddafi? The killing wasn't, but the intervention was. No. It was civilian protection mission that clearly violated the mandate. And so I think any pure legal analysis would have to say that that was illegal, but it was legitimate, and it was approved by. So here you have the powerful, who are allowed to argue that, well, the legality is not crystal clear, but it's legitimate. And so it seems to me you have possibly a case on the other side here where the defenders-- the weaker party-- feels distinctly at a disadvantage. And so an attempt to level the playing field-- OK, so it's not human shields. They're not, perhaps, perfectly legal. But they're legitimate in the context of this deeply, deeply asymmetrical conflict. And I wonder if some of those arguments don't resonate. And that's part of the challenge and why you get these-- it seems to me your argument is that what we're getting today is social enforcement of standards that are higher than the actual laws, right? I think for the Western militaries. But let me get back to your original. The propriety of jus ad bellum has no relationship to jus in bello. So the Gaddafi case-- So-- and the reason being is lots of-- exactly what I said before. Lots of people think they're justified in using force. And you're right-- that is political. The political world will make the ultimate decision on the jus ad bellum. I think you raise a good point. We get asked this a lot. I call it the cook book

question that you have on what is military advantage. Because military commanders ask that, too. Because they want the lawyer to make what is essentially a military judgment. That's why our courts in the US don't want to get involved. Because they say, we don't have the competence. That's a military judgment. And as a military lawyer, you tell the commander you determine what the military advantage is. But then you have to ask yourself, if you don't like that definition, what definition would you want? And I think that's the problem that was had when they were trying-- I think the world would love to have a better definition. But when you start thinking about it, well, what is going to be? Because there are so many different facts. And I'll tell you, when you get in with operators, with military people, they want to try to think about every possible military factual situation, and then you give them a legal reason so that they-- and you can't do that. Because I can tell you, the first damn thing that they get is going to be something that wasn't in that hundred scenarios that you went through. They have to internalize it. And what people need to do is they have to make decisions, and they have to be accountable for them, and they have to be able to explain why they were reasonable under the circumstances. But this is not unique to IHL. Take a look at criminal law. Take a look at what criminal law says about conspiracy. It doesn't even tell you what an overt act is. It's whatever the prosecutor decides it is and whatever the prosecutor can prove. It's a little bit of the nature of-- most law will have generalized statements like that. For example, in US military law, it is a crime to-- conduct unbecoming an officer and a gentleman is a crime. It went to the Supreme Court on the issue void for vagueness. How are people supposed to know in advance exactly what it is? And the answer that the US Supreme Court gave is kind of like they did in pornography. Military people know it when they see it. Because there is no way of describing every sort of situation. I think sometimes we, as lawyers and lawyers to be-- are you already a lawyer? Yes, but not practicing. We sometimes think, well,

we want a very specific-- a codal system. That's not the way the real world works. There are too many permutations of the facts. And sometimes, honestly, you have to push commanders to make a judgment. You need to make a decision, and you're going to be held accountable for it. So you need to start thinking, what is your reason for that. Even if you're not held accountable in a court of law, you're going to be held accountable in the court of world opinion. So you better-- especially, this comes up a lot with dual use targets, meaning something that can be used by civilians and military alike. You'd better come up with an answer. Well, is that required? Well, no. The law doesn't require it. But people are going to be asking this. And in today's world, you're going to have to be able to explain it. And that's why being a commander in the modern 21st century is a very hard job. Because the system will throw you under the bus when things go wrong. Watch what happens with this Kunduz thing. Somebody is going to be thrown under the bus. But do you remember what President Reagan said? Remember at the Beirut bombing when all those guys were killed? He said unaccountable. He didn't throw the military commanders under the bus, which he could have. Because remember, the rules of engagement at that time said, well, we don't want you loading your gun, because it might go off and kill somebody. Well, then of course, the suicide bombers blasted through the checkpoint before these guys would get their guns loaded. So bad judgment by the military commander, but the President took the responsibility. And that's our conundrum here. And like with the human shields, I think there is-- this is going to haunt me with these guys here-- there is an argument that you have to use the proportionality analysis. But the other side of it is the principle in international law that you don't allow someone to benefit from illegality. Because in theory, taking to the extreme, you could have a military force that is totally unbombable. Because you could have each-- if you had enough human shields, you'd surround each one of your soldiers with five people, and in theory, then you wouldn't be able to strike back. Will that happen? Unlikely. But we lawyers always think of the worst possible case scenario. And sometimes we're right,

actually, unfortunately. And so in the real world, the way-- So killing human shields is a form of prevention? I'm sorry? Killing human shields is a form of prevention? The idea is that you cannot allow an adversary to successfully turn illegality into an international norm. And that's the theory of, I think, the way the manual is written. I don't think that's the right-- and as you see in my piece, I try to go a little different direction. But what you said, that's a legitimate way. And that's the way of working in the real world. In the real world, I think most operations, you would do a proportionality analysis. And you do look for other ways of conducting the attack. And I think that's the obligation when you talk about feasibility. And let me give you one example from the First Gulf War. You remember [INAUDIBLE]? You remember when the Iraqis dragged their planes? [INAUDIBLE] is on the UNESCO thing. They drag their planes right next to it. Could you have attacked it? Maybe. Two legitimate fighter planes. And this is why it's so important for lawyers, especially, to know a lot about military equipment, strategies, and so forth. If you know anything about airplanes, and it's dragging across the desert, you will not get a pilot to get into that airplane and try to fly it, because that little bit-- unless you break down the whole engine and clean it very carefully. And so hypothetically, what happened was they looked for a bridge that would get those planes back to the airfield. And let's just say there isn't a bridge-- or there wasn't a bridge there. And that's the kind of thing that happens in the real world. Because if nothing else, people know-- military people believe that they're not going to be defended even if they do something legal if it doesn't look right. And so as we were talking about, international law, that's the baseline. Just because it's legal does not mean it's right. There's a morality that goes above that, and there's a political wisdom that goes above it. This is just the lowest common denominator that the international community could settle on. It doesn't mean everything is moral and right. Quickly, on Bruce's point about the ratios, I think if a ratio between your own military casualties and civilian casualties--

what that can-- it's not evidence of anything in and of itself. But if it indicates that you're putting such a premium on protecting your own troops that you're forgoing feasible precautions, then that is a problem. And arguably-- you may not agree with this-- NATO had to change from flying 30,000 feet to coming down a bit lower. Because in the 1999 conflict, I think they were hitting some refugee and IDT problems, because they weren't necessarily doing all they could to identify or distinguish between-- he's got a finger on the slide, I think. Here's the thing. I understand what you're saying. But the fact of the matter is, most modern planes are not targeting by looking out the window. And they have other systems that are optimized at a higher altitude. And so you think, well, they're doing that to protect themselves. Let's assume that's the case. It really isn't. It's to optimize how the weapons work. But if you're flying low and you're giving the enemy to shoot you down, you know what that does? You know how much a plane weighs? 30 tons. That means you have a 30-ton bomb uncontrolled in some area that can cause huge civilian casualties. But that situation rarely comes up. Because you know this-- the first week or two of any war with a country like the United States or Israel is destroying their integrated anti-aircraft system. But that's why they don't fly at 500 feet. Right. In NATO, the example you were giving, Serbia really at that point didn't have the capabilities of shooting down NATO planes, not in any-- They shot down that F1-17. They shot down one plane, yeah. And they shot down-- [INAUDIBLE] Just quickly to move on to Neve's question about the distinction between colocation and shielding. That is a difficult one, and you have to look at the facts of each situation. But I will say it has to come down to intent, really. It's difficult to make that call without some clear indication of intent. The ICRC-- how the ICRC puts it in its customary IHL study, they say, they use of human shields requires an intentional colocation of military objectives and civilians or persons [INAUDIBLE] with a specific intent of trying to prevent a targeting

of those military objectives now. And that's because you're talking about a serious violation, potentially a war crime. If you look at the jurisprudence of the ICTY tribunal, every case that was successfully prosecuted, it's clear cut human shielding. You're taking POWs or civilians and forcibly holding them in the situation because you're trying to prevent your own forces or particular piece of military equipment from being targeted. The fuzzier forms of shielding are-- it's much more difficult to tell. I don't doubt that there were cases of actual shielding, including Gaza, by Hamas. It's certainly true that ammunition was found in those empty spools, for example. But I think that Hamas was using part of a hostile for interrogating suspected collaborators. That's certainly not good practice. But generally, I think you do have to look at intent if you're going to talk about actual human shielding as opposed to colocation. And I agree with that. And I think we both agree you can never target a human shield. That can't be the target. It has to be the military. And the military objective is the only thing you-- you can't target human shields under any circumstance. They may be killed in your effort to get at the military objective, but that's different. And just one last thing on [INAUDIBLE]. When a guy is flying at 500 feet, he's not looking out the window. He's trying to get airplane in the-- he's trying to hit the-- I have to ask you the next question. I don't know if it's going to be the last. Well, it's something related to something we discussed. But I want you to enter more in depth that realm. So basically, the new United States law [INAUDIBLE] states the following about human shields. And I quote. "The party that employs human shields in an attempt to shield military objectives from attack assumes responsibility for their injury provided the attacker takes feasible precautions in conducting its attack. If the proportionality rule were interpreted to permit the use of human shields to prohibit attacks, such an interpretation would perversely encourage the use of human shields and allow violations

by the defending force to increase the legal obligations on the attacking force." Unquote. Hence, the manual, in light with international law, does two things. On the one hand, it prohibits, as we said, the transformation of civilians into human shields, while on the other, it allows military forces to attack targets that are protected by human shields provided they take all feasible precautions. What do feasible precautions mean? Could you offer better examples of the kind of feasible precautions that should be taken when targeting areas in which there are human shields? And in your view, should proportionality be applied differently, or does proportionality operate differently, in human shielding areas than it does in civilian areas? OK. On precautions-- these are really the precautions that are set out in Protocol 1, Article 57, and a part of customary IHL, including a non-international armed conflict, the overall principle being that in the conduct of military operations, constant care should be taken if there are civilian populations, civilians, and civilian objects. And that note is about military operations, which is why there have been just attacks. Then it gives precautions in the actual attack. For [INAUDIBLE], as we've said, you can't have human shields if there's no military objective. The first precaution is to do everything feasible to verify that it is a military objective. If it isn't, it should not be attacked. In reference to this precaution, it's important to remember another provision of Protocol 1, Article 52, paragraph 3-- in case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, house, or dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be. So if there's doubt that something that is normally a civilian object is being used for military purposes, presume that it isn't. Next, the plan has to choose the means and methods that will minimize harm to civilians and civilian objects. This has to do with the choice of weapon, how it's delivered-- for example, at what time, when to attack, when not to attack. And you have to refrain from

a targeting objective that would cause disproportionate harm to civilians and civilian objects. Another precaution-- if destroying any of several possible targets would give a similar military advantage, you have to choose the one that is least likely to endanger civilians. In reality, that's most likely to be if it without disrupting, say, communications, something like that. That would be an example where even if it was legitimate-- for example, Serbia radio and television in Belgrade-- if it is the fact that somehow-- not that it was being used for military communications, surely they could have chosen a way of disrupting it that would have been less harmful than targeting the headquarters and killing, I think, 16 civilians. When carrying out the attack-- so now this is not the planning. This is people are actually carrying out the attack. If it becomes apparent that the target is civilian or that attacking it would be disproportionate-- because, for example, it's been surrounded by civilians, or human shields, if you will-- the attack must be cancelled if it be disproportionate. Effective advance warning has to be given unless circumstances do not permit. And finally, the fact that an attacking party has taken feasible precautions does not then mean that they can go ahead and attack civilians. So if you give effective warning to civilians in the vicinity, whether they're human shields or not, they don't stop being civilians because you're giving them effective warning and they haven't left. So no provision of this article may be construed as authorizing any attacks against a civilian population, civilians, or civilian objects. So in a shielding situation, if an attacking party has taken these feasible precautions, they will be aware of the presence of civilians in the immediate vicinity and a targeted objective. And to a commander, normally-- a reasonable commander-- the presence of a large number of civilians, whether or not they are human shields, would weigh heavily in favor of suspending the attack until it can be carried out at a time and in a manner that will not put as many civilians at risk. Now, there's always going to be an argument about exceptionally military objectives whose neutralization would offer an extraordinarily high military

advantage-- for example, a time-sensitive opportunity to attack the enemy's high command-- in that case, it's still about proportionality, but you've got a very, very high military advantage, then it might be that you have to calculate that a certain number of civilian losses would be acceptable, so to speak. Now-- What's that limit? It's an impossible question. It's not a [INAUDIBLE] calculation. Yeah. There's also-- OK, first of all, military necessity, that's built in to every rule of IHL. So you can't argue military necessity to one's reason to ignore a rule. So if you look at all of these precautions and you look at a situation of-- at least the presence of civilians, whether they're shielding or not, you have to look also at the military necessity. Because-- an example, again-- well, this time from, say, Israel's war in Lebanon against Hezbollah-- if you keep on attacking an area from which rockets have been launched, and the pattern has shown that by the time you strike the place where the rocket has gone, the team that launched the rocket and moved the rocket launching pad, et cetera, and yet you're still endangering civilians, that's not-- there's no real military advantage you're gaining. That's just ultimately punishing the civilians in the area. So that's something that-- especially once the plan is clear, you shouldn't be doing. Now, the important question you raised about voluntary versus involuntary-- ordinarily, I think it would be very difficult for an attacker to determine whether a shield is voluntary, what the motives of the civilians are. And as you know, it's not just voluntary versus involuntary. Are they being physically restrained and kept there? And you might be able to tell that. Are they under moral pressure-- Is it important only from the side of the attacker? Before, you answered me and said it's about intent. And now you're telling me, well, the intent of the human shield is not important, because we can't determine that in-- No. The party that is-- if it's using human shields, it's only using human shields if it has the intent. If it's just colocation, it's not. And that goes to whether it's committing a violation and a war crime. But from the perspective of the attacking party-- I'm from the perspective of the shield. Well, of course it

matters to the shield. But you're saying the attacker can not know the intent of the shield. They sometimes will-- they will sometimes know. But to me, it's very-- Most of them won't. I agree with you. They can publicize it. But they can. But let's say they don't. We can't know, really. I'm not arguing that. But I think the same can be said about the attacker. We really can't know the intent of the attacker. He can utter the intent, but we don't know if the intent is true. But intent is an element of a war crime. Because accidents are not so the intent of the attacker is true. I agree. I'm just asking you guys to think of it critically about intent. And I think in the real world-- I used to be on the big distinction between voluntary and involuntary. But I talked with some-- and I've thought about it. And Avner is right. You really can't. And it isn't an element of the law. Because the mere fact that somebody is using shields of any sort is the illegality. So you're not targeting the shields. Conceptually, you're going after the person who's doing it. And I think when we talk about feasible, that's another one of those undefined sort of things. And it never will be defined. But in the real world, this is what we go on. Number one, they'd start looking at means and method. Means and method-- can we use a small [INAUDIBLE] bomb? Can we use a drum? We're not going to use artillery, or something like that. And then they'll make a hard judgment-- OK, we're going to get all kinds of hell for attacking this target. So do we really need to do it? And those evaluations really do take place. It doesn't mean that the attack is not going to take place because it comes down to if we don't get that guy, we don't know what he's-- he is going to go out and do other things. I think that when you think about human shields-- and yes, about proportionality-- what I've tried to express-- and I am alone on this, by the way, because I think the DOD evaluation is the best way to protect civilians is to not incentivize the use of human shields. I think that there is a reasonable-- reasonable minds can differ that no, the best way of protecting human shields is to apply the proportionality analysis. I do think reasonable people can differ on that. Because I think in most instances, you're going to be right. But when you start thinking strategically, you could come up with scenarios

where this use of human shields would be so pervasive that you're dictating your own defeat. And that's not the way IHL has intended to work. So in my little brain-- and it is smaller than most of yours-- I think that when you're trying to make this proportionality decision, if your aim is to deny the enemy this means and method of warfare, then that will affect your proportionality analysis-- in other words, how many civilians. But if your purpose is simply to punish the enemy, that's an unlawful purpose. Because that is what judicial forums do. You're trying to punish them for a war crime? No, you don't do that. And it's different from reprisal, because reprisal is to stop the enemy from doing it, but it's conceptually different than-- because in reprisal, you're really not concerned about proportionality in the same way. They have proportionality, but it's a different kind of proportionality. So in essence, I'm trying to split the baby. Chase, if you would, will you just talk about proportionality? Well, a civilian is a civilian. And as I said, I think it's very hard to tell whether some is voluntary, involuntary, unwitting, completely unaware of the fact that they're possibly being used as a human shield. And it's not in the law the differences. Either you're a civilian, or you're a civilian directly participating in hostilities, in which case you can be targeted for such time that you're directly participating. Otherwise, you can't be directly attacked. Yes, proportionality will enter into it. If shields are being used to protect an extremely valuable military objective that would offer tremendous military advantage, then you can't say under all circumstances it would be disproportionate. I think almost all commanders, when they see an objective that's surrounded by civilians, would think very carefully before proceeding with an attack, whether-- Well, you do that evaluation all the time knowing that some civilians are going to be killed. But it doesn't really matter if they're voluntary or involuntary, because you're going to go through that analysis. But when you know the enemy is specifically doing it, it does change, I think, the calculation. There's a question. I had a question for Avner. So I'm not a legal scholar,

so it would be really helpful if you could clarify this for me, which is not clear in my mind. So let's say that we agree that the involuntary use of human shields is illegal. And I want to still preserve some space for voluntary, but that's a different issue. And now the law has certain ways to address the situation in which human shields are being used, such as the precautions, the proportionality, et cetera, that you mentioned. It's built into the law. I'm curious-- what about the other way around? When the attacker alleges human shields, but in fact, it doesn't correspond to reality, what are the provisos built into the law to prevent that? Because otherwise, it seems that-- maybe I'm misunderstanding something, but there is a lot of provisions in the case that it's used. But in the case that it's used as a justification, it seems like there is nothing-- or maybe I don't know-- to prevent that. But the justification is just rhetoric. And it's not-- as far as I'm concerned, the attacking party, it's not for them to concern themselves about whether the defending party is committing the war crime of shielding. To me, it does not change the fact that these people are civilians, and you have to take the necessary feasible precautions, and they should be counted as, quote unquote, ordinary civilians in any proportionality calculus. And if you knowingly launch a disproportionate attack, that is a war crime. That's the consequence to the attacking party. But doesn't it have the repercussion that, in some ways, it renders the defender responsible for the ensuing civilian deaths? I think that was part of-- That is the law. But I think this is what you're getting at. That's why I'm curious about the inverse. What does the commander need to know? The standard in international law is what would a reasonable commander understand under those particular circumstances. And that's not any different than criminal law in other circumstances or law in general. For example, in the military, it's a criminal offense to negligently kill somebody. For example, under military law, if you give your car keys to somebody who you knew or reasonably should have known was going to be drunk and they killed somebody, you're guilty of negligent homicide. But it's done from the point

in which the commander makes the decision, not from hindsight when you turn out-- oh my god, it was a hospital. It's based on doing what a reasonable commander would do under the circumstances. And that's an unsatisfactory answer. And I'll tell you what my problem is, the difficulty is-- well, to what extent do you have to do extraordinary things that may be possible to do but not practical to do or very costly to do? Do you send special forces out there where they have to fight their way in and then fight their way out to put eyes on the target? These are real questions that are asked. And there is no cook book answer, even though a lot of commanders want a cook book. And the human condition is such that you have to sit there and bring to bear everything you know and make the best decision you can. But the end has to be-- especially where human shields are concerned-- what is the best way of protecting civilians. The manual provision is don't let them get away with using human shields. But the other issue is that, no, no, just keep with the proportionality analysis in all circumstances the same way. And I've tried to split the baby in an inarticulate way of-- Could I ask a quick followup on that? Because I find your answer really interesting. You refer to the commander. The person ordering-- OK. This is what I'm gathering from Neve and Nicola's work earlier today-- so to maybe bring that also into the discussion-- what if it's not just the individual commander and his judgment, but what if there's a whole machinery that renders this kind of utilization of human shielding-- the allegation of human shielding as systematic strategy? A trope during the entire attack on Gaza, that was used. So what if maybe the commander knows full well that there is no particular shielding at that site, but nonetheless, because of the systematic-- It doesn't matter what his government says or what his government propaganda is. He has to do the right thing-- not only from a moral, ethical perspective, but from a legal perspective. And that sounds in the defense of, I was just obeying orders. And that's a very difficult defense, and disfavored in modern-- but the commander has to do the right thing. It doesn't matter what his government is saying. On your point on

wanting to preserve the space for voluntary shields-- my sense is that what you are talking about in your article and presentation-- it's not human shields in the IHL sense. Rachel Corrie might be a secular saint, but she's not a human shield. She was protecting a civilian home. She wasn't being used to affect or herself volunteering to affect a military objective. Now, if you're talking about preserving a space for activists to surround sites from which indiscriminate missiles are being fired at civilian population centers, yes, that's voluntary shields. But I don't get the sense that that's what you're talking about. You were talking about peace activists, basically. So it's a different thing. But they're also being accused-- Yeah, of course. But they're also appropriating the language of human shields in combat zones, like in the case of the [INAUDIBLE], for example. So maybe that's disputable. But what if it is? If they declare and publicly announce-- in order to insert themselves precisely into this IHL discourse, then how do we deal with that? If they are actually unambiguously voluntarily shielding a legitimate military objective which should be targetable, they're still civilians in my interpretation of IHL, but they become akin to the munition factory worker, the truck driver, and civilian contractors on a military base. They're knowingly putting themselves in harm's way. They can't be directly targeted, but they are putting themselves in harm's way. But they're still civilians. [INAUDIBLE] Most of your examples were-- it was five Taliban, meaning even if there's people in there-- if killing five Taliban, say, for 50 civilians at the [INAUDIBLE], OK. Would your view change if it was combat as we more commonly know, as its combatants are all [INAUDIBLE] neutral [INAUDIBLE]. And it's not five Taliban who are claiming to kill civilians, but five Taliban who are planning to attack an allied base. So you're not saving the civilians by killing the other civilians. You're protecting your own forces, which is legitimate. But it's no longer-- you can no longer take the moral high ground and say, well, we had to kill them to save civilians. Say we had to kill them in order to protect our own troops, and in doing so, we took out 20. So take out the-- make it-- Sure. The way IHL works is-- gosh, I said IHL. I meant to say law of war. In the US, we don't

like using humanitarian, because it implies that war can be done in a humanitarian way. But the way the law of war is interpreted, you don't make that decision based on an individual attack. You look at the entire campaign. So in other words, if the campaign is to stop the Taliban from killing civilians, then the fact that in this particular instance, you're protecting the forces that are aiming to stop the Taliban from killing civilians, the fact that you are-- your forces are there for a reason. And protecting the forces is a legitimate military objective. So if they're using human shields to attack you, then that brings up-- the commander can't let his base fall. And that is an issue. During Somalia, remember, they had thousands of Somalis pushing women and children down towards the base, which was right down by the airport there. And they were trying to overrun the base. And if you've seen Black Hawk Down, you saw what they did to all the soldiers. And so that makes for a very, very difficult decision. But you do look at the campaign, not each individual attack. And the example that is classically used in law of war training is you conduct an attack that's a diversion-- in other words, you never really intended to march to Baghdad that way. So really, your real attack is coming from-- but it's still a legitimate military thing to do. It's a legitimate ruse. Even though you're killing people that aren't directly going to affect-- I understand that. My question, though, is the people you're killing are simply combatants, not war criminals. So would that change the calculus? No. Because the examples you used made more sense. Because you said, well, if I kill these five Taliban, I've saved 100 civilians. What if you haven't saved 100 civilians, but you saved five American soldiers? You want to protect the American soldiers. But the question isn't are you saving civilians, but is it worth killing 20 civilians to try-- Well, you're trying, presumably, that the American soldiers are there to protect 320 million Americans. And that's what every combatant-- In the international shield. The international law is ideologically neutral. So in other words, you look at, from a military perspective, that attack. And through using human shields, you have to [INAUDIBLE]. OK. So then it doesn't matter

whether they-- I'm just picking on your example. We'll continue this over dinner. The concluding remark is that there are no concluding remarks, because we have to move and go to dinner, which is at the Brown faculty [INAUDIBLE]. So let's meet in 10 minutes down at the door downstairs. People can go to the bathroom as well. And in 10 minutes, we will meet in the front. So thank you. Thank you guys. [APPLAUSE]